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NO. 84-1906

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

STATE OF ALABAMA,

Petitioner

v.

JAMES HARVEY CALLAHAN,

Respondent

APPENDIX TO

PETITION FOR A WRIT OF CERTIORARI TO THE ALABAMA SUPREME COURT AND THE ALABAMA COURT OF CRIMINAL APPEALS

CHARLES A. GRADDICK
ATTORNEY GENERAL OF ALABAMA

WILLIAM D. LITTLE
ASSISTANT ATTORNEY GENERAL
OF ALABAMA

Counsel of Record

250 Administrative Bldg.
64 North Union Street
Montgomery, Alabama 36130
(205) 834-5150

ATTORNEYS FOR PETITIONER

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APPENDIX A

JULY 5, 1983

THE STATE OF ALABAMA--JUDICIAL DEPARTMENT

IN THE ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 1982-83

7 DIV. 9

James Harvey Callahan

v.

State

Appeal from Calhoun Circuit Court

SAM TAYLOR, JUDGE

James Harvey Callahan was tried and convicted, pursuant to § 13A-5-40(a)(1), Code of Alabama 1975, for the capital felony of kidnapping and, subsequently, murdering Rebecca Howell in Calhoun County, Alabama. After proper sentencing phase hearings before the jury and the trial court, the trial court noted the jury's majority verdict, by a vote of 10 to 2, in

favor of the death penalty, and sentenced the appellant to death by electrocution.

Rebecca Howell was abducted from the Norge Village Washeteria in Calhoun County, Alabama, some time between, 12:30 a.m. and 1:30 a.m. on the morning of February 4, 1982. Her body was found about two weeks later floating in Tallasseehatchee Creek near Broughton Bridge, where it had become entangled in some brush. An autopsy revealed that Ms. Howell had been killed by asphyxiation due to an obstruction of her airway, consistent with smothering. Her hands had been bound with four strips of white duct tape. She had apparently been raped. Her body was found in blue jeans but without underpants, shoes, or socks.

Murray Knight, the victim's boyfriend, saw her around 11:15 p.m. on the night she was abducted. Ms. Howell had just gotten off work and was on her way to wash some

clothes. She had planned to meet Knight afterwards.

Four blocks from Norge Village Washeteria, Jimmy Dunagan saw a woman with "long, brown or reddish hair" make a telephone call across the street from another washeteria at 11:40 p.m. He also saw a man in a truck, which he later identified as appellant's truck, watching the young woman in the telephone booth. When the woman left, the man followed her in his truck. Dunagan copied down the tag number of the truck, a number later found to be registered to the appellant.

A police officer on routine patrol saw Ms. Howell in the Norge Village Washeteria between 12:30 and 12:45 a.m. A passerby saw a man fitting appellant's description inside the washeteria at 1:00 a.m. apparently trying to "pick-up" a young woman. Susan Bragg, a fellow employee of

Ms. Howell, passed by Norge Village Washeteria on her way home from work. She saw a green pick-up truck, which she later identified as appellant's truck, outside the washeteria and she thought someone inside the truck waved at her.

At 1:30 a.m., because Ms. Howell had not returned as expected, Murray Knight and some of his friends went to the washeteria to look for her. She was gone, but the clothes she had been washing were still there and one pair of wet blue jeans was on the floor. Ms. Howell's car was still parked outside. Knight called the police.

The appellant was arrested after a "stakeout" of his father's home on February 22, 1982, five days after Ms. Howell's body had been discovered. After the appropriate Miranda warnings were given and the standard "waiver of rights" forms were signed the appellant told Calhoun County Sheriff

Roy Snead that he would help the authorities locate the victim's missing boots and purse. He explained to Snead that he had picked up Ms. Howell at the Norge Village Washeteria on the night she was killed and had driven her to his mobile home. He stated that later that night, while they were driving through the woods near the Tallasseehatchee Creek (where the victim's body was later discovered), Ms. Howell, in her bare feet jumped out of his truck and ran off through the woods. He contended that he threw her boots out at that time.

A subsequent search for the missing boots in the woods near Tallasseehatchee Creek was unsuccessful. However, the appellant did, eventually, lead the authorities to the victim's missing purse. It was found behind a wood pile at the home of appellant's father-in-law. The appellant stated that he knew it was there because he

saw someone put it there, but he never stated who that someone was.

The victim's missing boots were later discovered inside appellant's mobile home by appellant's sister and brother-in-law. They were turned over to the police.

In addition to the incriminating circumstances discussed above, appellant's fingerprints were found on a roll of gray duct tape discovered on the night of the abduction in the parking area outside the Norge Village Washeteria. During a search of appellant's home authorities recovered a strip of white duct tape of the same identical type as that used to bind the victim's wrists. They also discovered some stands of hair, consistent with the victim's head hair, on a mop, and some red carpet fibers identical to a red fiber found on one of the victim's socks. Dog hairs found inside appellant's truck were

consistent with the hair from the victim's dog.

Because there was evidence that Ms. Howell had been raped before she was killed, a vaginal swab was analyzed. It was found to contain seminal fluid from a "group O" secretor of H antigens. Tests revealed that Murray Knight, Ms. Howell's boyfriend, is a non-secretor but that the appellant is, indeed, a "group O" secretor.

Furthermore, contrary to appellant's pre-trial statement to the authorities that Ms. Howell exited his truck and ran through the woods near Tallasseehatchee Creek, the medical examiner testified that her feet and ankles were not scratched or cut as they would have been had she run through the thick underbrush in that area.

In defense, the appellant challenged the validity of the search warrants for his

truck and his mobile home, the voluntariness of his pre-trial statements, and the reliability of the hair, fiber and biological fluid comparisons. However he only took the witness stand, in his own behalf, to give voir dire testimony as to the voluntariness of his statements to the authorities. He did not present an alibi defense.

I

Initially, the appellant contends that the trial court erred in denying his motion for a change of venue. The appellant claimed at trial and argues on appeal that a change of venue was warranted because a majority of the prospective jurors in Calhoun County had been exposed to extensive pre-trial publicity and had learned many of the details of the instant offense and some of the details of appellant's background. At the pre-trial hearing on

the motion for a change of venue, the appellant presented the results of a public opinion survey which showed that many of the citizens of Calhoun County had "preconceived notions of the appellant's guilt." Approximately 64 percent of those persons who agreed to be interviewed during the appellant's survey answered affirmatively when asked, "Do you believe from the things that you have read or heard that James Harvey Callahan is the person who murdered Rebecca Howell?"

The trial court gave the appellant much latitude in presenting his evidence during the change of venue hearing. The appellant, the state, and the trial court, itself, conducted thorough and sifting examinations of all the witnesses presented. Most of the testimony concerned the validity of the public opinion survey conducted by the appellant. It was

revealed that the survey was directed by appellant's counsel, who hired four young women with no training and little or no experience in conducting public opinion surveys. These women conducted telephone interviews with 390 citizens of Calhoun County to determine the impact of the pre-trial publicity upon prospective jurors. The interviewers were instructed to obtain a designated number of responses from the various communities within the County to obtain a fair cross-section of the population, but they received little, if any instruction as to how to randomly select their interviewees, what to do with incomplete surveys, and how to document non-responses. They were essentially independent from each other and, consequently, handled the selection of interviewees, the incomplete surveys and the non-responses in somewhat inconsistent

manners. They did not use any systematic method of randomly selecting those persons called and the results obtained by the four interviewers were not verified in any way. There was no assurance against overlap among the callers and no concrete method used to insure that a particular person called actually lived within the area or community for which his response was needed.

The appellant presented Steve Hoffman, a statistician at Fort McClellan, Alabama, as an expert on public opinion surveys. He stated that, in his opinion, the survey was properly conducted, that it was 95 percent accurate and that it indicated that 64 percent of the population of Calhoun County had preconceived notions of the appellant's guilt due to pre-trial publicity. Upon further examination, however, he stated that he had never conducted a survey of

this type, and that his earlier comments about the accuracy of the survey were based on the assumptions that the interviewers received training as to how to conduct the survey, that their results were verified and that the number of non-responses (those who refused to answer the survey) was not excessive. He eventually concluded that the survey was not perfectly scientific and was not conducted in the best manner. The state's expert witness, Glenn Browder, a professor at Jacksonville State University, testified that he had many years of experience with public opinion surveys, and had conducted 20 to 30 surveys similar to the one conducted by the appellant. He stated that he had taken courses, had taught courses, and had conducted training sessions dealing with public opinion surveys. He emphasized that in the absence of trained interviewers, a systematic

method of selecting interviewees to prevent overlap and bias, and a verification of the survey results, the validity of a public opinion survey would be highly suspect. He stated that the excessive number of non-responses might have affected the results and, at the very least, would have prompted him to increase the sampling size to minimize the non-response effect.

During the venue hearing the appellant also presented affidavits from several members of the local news media, affidavits which verified that the publicity surrounding Rebecca Howell's murder had been extensive.

The trial court, which took an active part in investigating the accuracy of appellant's survey, reviewed all of the venue hearing testimony and concluded that appellant's survey was not a reliable reflection of the opinions of prospective

jurors in Calhoun County and that the pre-trial publicity was not "of such magnitude or quality" that the appellant would be unable to secure a fair and impartial trial in Calhoun County. The trial court, therefore, denied appellant's change of venue motion.

It is well settled in Alabama that upon motion for a change of venue the defendant has the burden of proving inherent or actual prejudice on the part of the prospective jurors and that the decision on the venue question rests within the discretion of the trial court, unless such discretion is abused. See, Moulds v. State, 426 So.2d 942 (Ala. Crim. App. 1982); Robinson v. State, [Ms. 8 Div. 439, February 1, 1983] ____ So.2d ____ (Ala. Crim. App. 1983); Hopkins v. State, [Ms. 1 Div. 389, February 1, 1983], ____ So.2d ____ (Ala. Crim. App. 1983); Duncan v.

State, [Ms. 8 Div. 515, March 29, 1983], ____ So.2d ____ (Ala.Crim.App. 1983); and cases cited in each.

The standards for determining when the defendant's burden of proof has been satisfied and for reviewing the trial court's determination of the venue issue are well established and adequately discussed in our four recent opinions cited above. They need no further treatment herein. We have applied these standards to the instant case and have concluded that the trial court did not abuse its discretion in denying appellant's change of venue motion. We, too, question the validity of appellant's public opinion survey. Moveover, even assuming that the survey is accurate, that 64 percent of the prospective jurors had "preconceived notions of the appellant's guilt," there was no evidence that these prospective jurors would not be able to "lay aside

[their] impression[s] or opinion[s] and render a verdict based on the evidence presented in court." Murphy v. Florida, 421 U.S. 794 (1975) [cited in Anderson v. State, 362 So.2d 1296 (Ala.Crim.App. 1978)]. The voir dire examination of the actual jury venire did not indicate any inherent prejudice against this appellant. Prospective jurors who indicated actual bias against the appellant were properly dismissed. Except as noted below, the appellant had no objections to the final jury panel.

From aught that appears on the record the appellant received a fair and impartial trial in Calhoun County.

II

Appellant's only objection to the final jury panel was his assertion that, in light of § 13A-5-46(f), Code of Alabama 1975, those veniremen with fixed opinions

against the death penalty, should not have been dismissed for cause. Appellant's theory was, and is, that, because § 13A-5-46(f) now permits a death penalty verdict on the vote of only 10 of the 12 trial jurors, the rationale for dismissing Witherspoon jurors [see, Witherspoon v. Illinois, 391 U.S. 510 (1968)] no longer applies. In effect the appellant argues on appeal that the Witherspoon rule should be abolished in Alabama. We disagree.

The appellant cites no authority, and we have found none, to support his arguments. Witherspoon jurors, those irrevocably committed to vote against the death penalty, are appropriately dismissed to insure a fair and impartial jury. A fair and impartial jury is no less necessary now that only 10 jurors are needed for a death penalty verdict.

III

Appellant's argument that the trial judge erred in refusing to recuse himself is without merit. It appears that the trial judge had earlier assisted Fred Lybrand, an attorney hired by appellant's father, in obtaining access to the appellant in the county jail. At Lybrand's request the trial judge accompanied him to the county jail, interrupted an interrogation session of the appellant being conducted by local investigators, and informed the appellant that he could stop answering questions, if he so desired, and consult with Lybrand. As a result the interrogation was stopped and the appellant did consult with Lybrand.

Because of this involvement in the case, the appellant made a motion for the trial judge to recuse himself from the case so that he would be available as a witness

as to the voluntariness of appellant's statements to authorities. The appellant did not, and does not, contend that the trial judge was in any way incompetent, prejudiced, or biased against him.

In denying appellant's motion, the trial judge explained that, despite his contact with the appellant in the interrogation room at the county jail, he, the trial judge, had not independently learned any of the facts and circumstances surrounding the case, and had learned nothing material to any issue regarding the voluntariness of any of appellant's statements to the authorities. The trial judge further noted that Fred Lybrand was available to the appellant as a witness to the trial judge's involvement, should the appellant, indeed, need a witness to those events.

In Alabama a trial judge should disqualify himself in a case where he has personal knowledge of disputed facts and circumstances of the case or where he is likely to be a material and necessary witness. See, Alabama Canons of Judicial Ethics, Canon 3C.(1)(a) and 3C.(1)(d)(iii) (1975); Malone v. State, 46 Ala. App. 363, 242 So.2d 409, cert. denied, 286 Ala. 736, 242 So.2d 410 (1970). We agree with the trial judge, however, that under the circumstances of this case his recusal was not mandated. We will therefore, not hold him in error for refusing to recuse himself.

During the course of their investigation the local authorities searched appellant's truck and his residence, and recovered several items of evidence that were either presented or discussed at trial. There was testimony that strands of hair

found on a mop in appellant's mobile home were consistent with the victim's head hair. There was testimony that a dog hair found in appellant's truck was consistent with the hair from one of the victim's dogs. Red fibers found on the carpet in appellant's home were consistent with a red fiber found on one of the victim's white socks, which were recovered from the victim's purse. A strip of white duct tape found in appellant's mobile home was of the same variety as that removed from the victim's wrists. There was also testimony that one pistol was found behind the front seat of appellant's truck and two more were found in his home.

The appellant contends that these items were inadmissible because the search warrant was invalid and because the items recovered were not within the perimeters defined in the search warrant.

A

Appellant claims that the search warrant was invalid because the affidavit given by Deputy M. L. Kirby of the Calhoun County Sheriff's Department to the issuing magistrate was insufficient to support "probable case" for the search.

We have carefully reviewed the affidavit signed by Deputy Kirby, which was read into evidence during a voir dire examination of Kirby (R. 376), and have concluded that it was more than sufficient to support the warrant issued. Appellant's arguments in this regard are unfounded. See, Waters v. State, 357 So.2d 368 (Ala. Crim.App.), cert. denied, 357 So.2d 373 (Ala. 1978), and cases cited therein. Williams v. State, 401 So.2d 312 (Ala.Crim.App. 1981).

The affidavit stated the pertinent facts surrounding the abduction and murder of Rebecca Howell that had been discovered

pursuant to the police investigation between the date of the crime, February 4, 1982, and the date of appellant's arrest, February 22, 1982. Nearly three weeks of investigation had revealed that Howell had been abducted from the Norge Village Washeteria in Calhoun County and murdered, that her boots and purse were missing, that appellant's truck was seen at the Norge Village Washeteria when Howell was abducted, that appellant was driving the same truck at the time of his arrest, that he concealed something behind the front seat before he exited his truck, and that he locked the door of the truck to prevent the arresting officers from gaining access, therein. As in Waters, supra, these facts were more than sufficient to support the issuance of the warrant. There is no merit in appellant's argument that corroboration or additional proof of reliability was

necessary for the information that Kirby obtained from "citizen informers." Hadley v. State, 391 So.2d 158 (Ala. Crim. App.), cert. denied, 391 So.2d 162 (Ala. 1980).

B

The appellant further points out that the items recovered during the search of his truck and his mobile home were not listed in the search warrant, and were seized illegally as a result of a "fishing expedition." He contends that these items were not within the perimeters of the search warrant and were, therefore, inadmissible.

It is undisputed that the warrant authorized a search for the victim's boots and purse, and that the items recovered were not in any way related to the missing boots and purse. However, a close look at the entire record on appeal reveals that any errors committed in admitting or

discussing any of these aforementioned items were not harmful to appellant's case.

It was immediately pointed out that the two pistols found in appellant's mobile home belonged to his sister and her husband and were in no way connected with the appellant. See, Carroll v. State, 370 So.2d 749, 758 (Ala. Crim. App.), cert. denied, 370 So.2d 761 (Ala. 1979). The appellant concedes in brief, and we agree, that the pistol found behind the seat of his truck was arguably related to the offense in question and, therefore, meets the requirements for seizure adequately outlined in Satterwhite v. State, 364 So.2d 345 (Ala. Crim. App.), rev'd on other grounds, 364 So.2d 359 (Ala. 1978): a reasonable connection between the items seized and the crime, a reasonable basis for drawing the connection, and a discovery

resulting from a good faith search within the perimeters of the search warrant.

Appellant's "fishing expedition" argument is focused primarily on the hair and fiber evidence and the strip of duct tape.

The victim's wrists were bound with four strips of white duct tape. The officers executing the search warrant knew this when they went to search for the missing boots and purse. The strip of white duct tape recovered from appellant's mobile home was in plain view of the searchers and appeared to be of the same type as that found on the victim's wrists. Under these circumstances, the strip of duct tape also met the seizure and admissibility requirements discussed in Satterwhite, supra.

The hair and fiber evidence, obtained by sweeping and vacuuming certain areas of

appellant's truck and home, was arguably inadmissible. However, even if the seizure of this evidence was illegal and the admission of this evidence and testimony related thereto was error, it did not injure the appellant. The hair and fiber evidence was probative only to show that the victim had been inside appellant's truck and his mobile home. In statements to the authorities, revealed to the jury at trial, the appellant admitted that he had driven the victim, in his truck, to his mobile home. Her presence inside his truck and his home was, therefore, proven by appellant's own statements. For this reason, the admission of the hair and fiber evidence, if error, was not reversible error. See, Coulter v. State, [Ms. 8 Div. 673, December 28, 1982], ____ So.2d ____ (Ala. Crim. App. 1982), and cases therein cited.

V

The appellant further claims that the pistol found in appellant's truck and the hair and fiber evidence, if not inadmissible because illegally seized, were inadmissible for other reasons.

A

The appellant claims that the hair and fiber comparisons were of questionable reliability and were, therefore, misleading and "seriously prejudicial" to his case. As noted above, we have concluded that the hair and fiber comparisons were not injurious to the appellant because the victim's presence in appellant's truck and home was established by appellant's own statements. Moreover, the reliability of the hair and fiber evidence, which was disputed in the presence of the jury, was, under these circumstances, significant in determining

the weight of such evidence and not its admissibility.

B

Appellant claims that the pistol found behind the seat of his truck was used as evidence of a collateral crime and that its admission was, therefore, error. There is nothing in the record, however, that supports appellant's argument that the state was attempting to prove a collateral crime.

The evidence does indicate that the pistol is the item that appellant deposited behind the seat of his truck the morning of his arrest, just before he exited the truck and locked the door. For aught that appears, the pistol might have been used to coerce the victim into the truck on the night of the murder.

The admissiblity of the evidence related to this pistol, and there was no

emphasis placed thereon, was merely a question of relevancy, a determination properly left to the sound discretion of the trial court. The trial judge was in the best position to make this determination and, in this instance, we have found no abuse of discretion. Strickland v. State, 348 So.2d 1105 (Ala. Crim. App.), cert. denied, 348 So.2d 1113 (Ala. 1977); Payne v. State, 419 So.2d 286 (Ala. Crim. App. 1982).

VI

A state toxicologist, Roger Morrison, testified that a vaginal swab taken from the victim revealed that, prior to death, she had had sexual intercourse with a man who was a "group O" secretor of H antigens. Biological samples revealed that the victim's boyfriend, Murray Knight, is a non-secretor, but that the appellant is a "group O" secretor. The appellant contends

that this testimony was inadmissible because 80 percent of all males are secretors of blood factors. We disagree.

"The results of examinations and test[s], blood-grouping tests, fingerprint comparisons, and ballistics tests, are admissible, provided a proper foundation is laid." Chatom v. State, 348 So.2d 838 (Ala 1977). For examples, see, Dockery v. State, 269 Ala. 564, 570, 114 So.2d 394 (1959); and Carter v. State, 405 So.2d 957, 961 (Ala.Crim.App.), cert. denied, 405 So.2d 962 (Ala. 1981).

The biological fluid comparisons in the instant case were not conclusive by any means, but they did show that appellant could not be ruled out as the man who had sexual intercourse with Rebecca Howell prior to her death. The jury was informed that 80 percent of the male population were

secretors, a fact which went to the weight of this evidence and not its admissibility.

The materiality of this evidence was a matter within the trial court's discretion, which was not abused, herein. Strickland v. State, supra; Payne v. State, supra.

VII

Despite appellant's arguments to the contrary, the trial court did not err in admitting an unpleasant photograph showing the victim's hands bound by white duct tape. The trial court did not abuse its discretion in ruling that the probative value of this photograph outweighed any undue prejudice to the appellant. See, Coulter v. State, [Ms. 8 Div. 673, December 28, 1982] ____ So.2d ____ (Ala. Crim. App. 1982); Hopkins v. State, [Ms. 1 Div. 389, February 1, 1983], ____ So.2d ____ (Ala. Crim. App. 1983); Duncan v. State, [Ms. 8

Div. 515, March 29, 1983], ____ So.2d ____ (Ala.Crim.App. 1983).

VIII

After the appellant had been advised of his Miranda rights and had read and signed a consent form to take the authorities to the location of the victim's missing boots and purse, and had signed a "waiver of counsel" form, he made several incriminating statements to Sheriff Snead and eventually led Snead and other officers to the victim's missing purse. Among other things, the appellant told Snead that Rebecca Howell had entered his truck at the washeteria and had accompanied him to his mobile home, and that later she had fled from his truck into the woods near Tallasseehatchee Creek, where her body was later discovered. However, he never admitted harming Ms. Howell in any manner whatsoever.

The appellant contends that the statements made to Sheriff Snead were inadmissible because similar statements had been made to the authorities the previous day and there was no proof that these initial statements had been preceeded by Miranda warnings.

The appellant's argument in this respect is not supported by the evidence. Joe Hubbard, an assistant district attorney for Calhoun County, testified that on the day before the appellant made the incriminating statements to Sheriff Snead, the appellant received a recitation of his Miranda rights and he, subsequently, signed a "waiver of rights" form prior to any questioning.

Furthermore, the trial court entertained extensive voir dire testimony of all available witnesses to appellant's incriminating statements, including the

appellant, himself. Although the appellant testified that his statements were involuntary, there was an abundance of testimony to the contrary. The trial court ruled, in light of all the testimony, that appellant's statements were voluntary. This determination was within the sound discretion of the trial court and was amply supported by the evidence herein. See, Baldwin v. State, 372 So.2d 26 (Ala. Crim. App. 1978), aff'd, 372 So.2d 32 (Ala. 1979), vacated on other grounds, 448 U.S. 903 (1980); Moore v. State, 415 So.2d 1210 (Ala.Crim.App. 1982); Bryant v. State, 428 So.2d 641 (Ala.Crim.App. 1982), cert. denied, 428 So.2d 646 (Ala. 1983). Therefore, the testimony concerning appellant's statements was properly admitted.

Pursuant to § 13A-5-53, Code of Alabama 1975, and in accordance with appellant's specific requests, we have

carefully reviewed all the facts and circumstances of this case to determine the propriety of the death sentence for this appellant.

We have reviewed the guilt phase proceedings and the sentencing hearings and have found no errors adversely affecting the rights of the appellant. The trial court's findings concerning the aggravating and the mitigating circumstances are amply supported by the evidence presented either at the guilt phase or sentencing phase hearings.[1]

Although it appears that there was extensive pre-trial publicity concerning the instant case, contrary to appellant's insistencies, it does not appear that the

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[1]The trial court's findings of fact and conclulsions with respect to aggravating and mitigating circumstances are attached as "Apendix A" to this opinion.

sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor. The trial court correctly found that this appellant had been previously convicted of two felonies involving the use or threat of violence to the person - two convictions for assault with intent to murder. This aggravating circumstance was considered in addition to the fact that the instant murder was committed during a kidnapping. The trial court correctly found that none of the enumerated mitigating circumstances existed and that the two aggravating circumstances mentioned above outweighed any other mitigating circumstances.

The sentence of death in this instance is neither excessive nor disproportionate to the penalty imposed in similar cases.

With all due respect to the rights of this appellant, his conviction and sentence of death must be arrirmed.

AFFIRMED.

ALL THE JUDGES CONCUR.

APPENDIX B

FEBRUARY 8, 1985

THE STATE OF ALABAMA - JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

OCTOBER TERM, 1984-85

Ex parte: James Harvey Callahan

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF CRIMINAL APPEALS

(In re: James Harvey Callahan

82-1172 v.

State of Alabama)

PER CURIAM.

A writ of certiorari was granted to the Court of Criminal Appeals to review the death penalty judgment, pursuant to Code 1975, § 12-22-150, and Rule 39, A.R.A.P.

Our primary concern is whether certain inculpatory statements made by the Petitioner were properly admitted into evidence. The Attorney General asks this Court to overrule Cagle v. State, 45 Ala.

App. 3, 221 So. 2d 119, cert. denied, 284 Ala. 727, 221 So.2d 121 (1969), and properly states the Petitioner's contention as follows:

> "Petitioner urge[s] the Court to hold inadmissible his statement to law enforcement officials made February 24, 1982. The Petitioner's theory was that the statement was based upon an earlier statement made February 23, 1982, and that the State did not sufficiently prove that the specific warnings required by Miranda v. Arizona, 384 U.S. 436 (1966), were given to the Petitioner prior to the earlier statement; hence the allegedly inadmissible earlier statement tainted the later statement."

The Petitioner made two separate incriminating statements, the first on February 23, 1982, and the second on February 24, 1982. Concededly, the initial statement was not prefaced by appropriate Miranda warnings. The State contends that, because the confession of February 24 (the one admitted into evidence) was predicated upon a valid Miranda warning, the burden

shifted to the defendant to show the specifics of those Miranda rights not read or stated to him before the February 23 confession.

The proper questions for resolution are whether a second confession obtained after a proper Miranda warning was given is rendered inadmissible if it is the progeny of a previous illegally elicted confession, and who has the burden of showing that the second confession was or was not illegally tainted by the first.

Extrajudicial confessions are prima facie involuntary and inadmissible, and the burden is on the State to prove that the confession was made voluntarily, C. Gamble, McElroy's Alabama Evidence, § 200.02(1) (3d ed. 1977). The cases which support this ancient proposition are legion and are collected in 6 Ala. Digest Criminal Law, Key Numbers 516, 517, 517.1, 519.

After the decision in Miranda v. Arizona, 384 U.S. 436 (1966), the State is required to lay two predicates before a confession is admissible. The first predicate requires a showing of voluntariness, i.e., absence of coercion or offer of reward, etc., and the second requires the State to prove that a proper Miranda warning, i.e., the right to remain silent and the right of counsel, etc., was given prior to any questioning by the police.

As Cagle v. State, 45 Ala. App. 3, 221 So.2d 119, cert. denied, 284 Ala. 727, 221 So.2d 121 (1969), points out, the precise question before us was decided by the United States Supreme [Court] in Westover v. United States, 384 U.S. 436 (1966). The Westover decision, incidentally, is incorporated in the Miranda decision, supra.

"At the time the FBI agents began questioning Westover, he

had been in custody for over 14 hours and had been interrogated at length during that period. The FBI interrogation began immediately upon the conclusion of the interrogation by Kansas City police and was conducted in local police headquarters. Although the two law enforcement authorities are legally distinct and the crimes for which they interrogated Westover were different, the impact on him was that of a continuous period of questioning. There is no evidence of any warning given prior to the FBI interrogation nor is there any evidence of an articulated waiver of rights after the FBI commenced its interrogation. The record simply shows that the defendant did in fact confess a short time after being turned over to the FBI following interrogation by local police. Despite the fact that the FBI agents gave warnings at the outset of their interview, from Westover's point of view the warnings came at the end of the interrogation process. In these circumstances an intelligent waiver of constitutional rights cannot be assumed.

"We do not suggest that law enforcement authorities are precluded from questioning any individual who has been held for a period of time by other authorities and interrogated by them without appropriate

> warnings. A different case would be presented if an accused were taken into custody by the second authority, removed both in time and place from his original surroundings, and then adequately advised of his rights and given an opportunity to exercise them. But here the FBI interrogation was conducted immediately following the state interrogation in the same police station - in the same compelling surroundings. Thus, in obtaining a confession from Westover the federal authorities were the beneficiaries of the pressure applied by the local in-custody interrogation. In these circumstances the giving of warnings alone was not sufficient to protect the privilege."

Id., 384 U.S. at 495-497.

The Court held that it could not find that Westover, prior to the time he made the second statement, knowingly and intelligently waived his right to remain silent and his right to consult with counsel.

The Miranda decision makes it abundantly clear that a heavy burden rests on the state to show a waiver of a

constitutional right:

> "If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel. Escobedo v. State of Illinois, 378 U.S. 478, 490, n.14, 84 S.Ct. 1758, 1764, 12 L.Ed.2d 977. This Court has always set high standards of proof for the waiver of constitutional rights, Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938), and we reassert these standards as applied to in-custody interrogation. Since the State is responsible for establishing the isolated circumstances under which the interrogation takes place and has the only means of making available corroborated evidence of warnings given during incommunicado interrogation, the burden is rightly on its shoulders.
>
> "An express statement that the individual is willing to make a statement and does not want an attorney followed closely by a statement could constitute a waiver. But a valid waiver will not be presumed simply from the silence of the accused after

warnings are given or simply from the fact that a confession was in fact eventually obtained. A statement we made in Carnley v. Cochran, 369 U.S. 506, 516, 82 S.Ct. 884, 890, 8 L.Ed.2d 70 (1962), is applicable here:

> "'Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver.'"

Id., 384 U.S. at 475.

In Wong Sun v. United States, 371 U.S. 471 (1963), the United States Supreme Court was concerned with what effect to give the evidentiary exclusionary rule where narcotics were discovered as a result of illegally induced declarations of a co-defendant. In that regard the Court observed:

> "We now consider whether the exclusion of Toy's declarations requires also the exclusion of the narcotics taken from Yee, to

which those declarations led the police. The prosecutor candidly told the trial court that 'we wouldn't have found those drugs except that Mr. Toy helped us to.' Hence this is not the case envisioned by this Court where the exclusionary rule has no application because the Government learned of the evidence' from an independent source,' Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392, 40 S.Ct. 182, 183, 64 L.Ed. 319; nor is this a case in which the connection between the lawless conduct of the police and the discovery of the challenged evidence has 'become so attentuated as to dissipate the taint.' Nardone v. United States, 308 U.S. 338, 341, 60 S.Ct. 266, 268, 84 L.Ed. 307. We need not hold that all evidence is 'fruit of a poisonous tree' simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is 'whether, granting establishment of the primary illegality, the evidence of which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.' Maguire, Evidence of Guilt, 221 (1959). We think it clear that the narcotics were 'come at by the exploitation of that illegality'

and hence that they may not be used against Toy."

Id., 371 U.S. at 487-488.

While it may be argued that Wong Sun is not exactly in point, it is nevertheless instructive as to what the considerations of a court must be in deciding the admissibility of evidence which was gained in part or totally by exploitation of previously illegal conduct. In this regard, however, the Court stated:

> "Nor do the policies underlying the exclusionary rule invite any logical distinction between physical and verbal evidence. Either in terms of deterring lawless conduct by federal officers, Rea v. United States, 350 U.S. 214, 76 S.Ct. 292, 100 L.Ed. 233, or of closing the doors of the federal courts to any use of evidence unconstitutionally obtained, Elkins v. United States, 364 U.S. 206, 80 S.Ct. 1437, 4 L.Ed.2d 1669, the danger in relaxing the exclusionary rules in the case of verbal evidence would seem too great to warrant introducing such a distinction."

Id., 371 U.S. at 486.

Actually, the fundamental principle which we address in this case was decided by this Court prior to the Miranda decision. In Huntley v. State, 250 Ala. 303, 34 So.2d 216 (1948), Chief Justice Gardner wrote:

> "The rule is well established that where a confession has been obtained, or inducement held out, under circumstances which would render a confession inadmissible, a confession subsequently made is not admissible in evidence, unless, from proper warning of the consequences, or from other circumstances, there is reason to presume that the hope or fear, which influenced the first confession, is dispelled. And in the absence of any such circumstances the influence of the motives proved to have been offered will be presumed to continue, and to have produced the confession, unless the contrary is shown by clear evidence; and the confession will be rejected. Speaking to the same question, this court in Porter v. State, 55 Ala. 95, observed that the inquiry, in all such cases, presents itself, has all influence been withdrawn and obliterated from the mind of the prisoner, so as to show, affirmatively, that the

confession is clearly voluntary, and not influenced in the slightest degree by the threats, promises, or other inducements, previously made or held out, or by anything which resulted from previous threats or promises? For, if such previous inducements were the remote or contributory cause of confession, the policy of the law forbids that such confession shall be used in evidence; and when previous inducements have resulted in drawing a confession, the proof should be very clear and strong, that the mind of the prisoner had been completely disabused, so as to convince the court that the confession was as free as if no motives to make it had ever been offered to the prisoner. Less than this falls short of proving that the confession was voluntary."

Id., 250 Ala. at 306-307, 34 So.2d at 219-220.

Our review of the decisions of the federal courts shows that they uniformly follow this rule. The following is a typical statement:

"The circumstances surrounding a prior illegal confession may in some cases carry over and taint a subsequent confession, thereby rendering it inadmissible, even

> if the accused has been advised of his Miranda rights prior to the second confession. In order for this causal chain to be severed, the second confession must be sufficiently an act of free will to purge the primary taint."

United States v. Lee, 699 F.2d 466, 468 (9th Cir. 1982) (citations omitted).

See also, e.g., Fischer v. Scafati, 439 F.2d 307 (1st Cir. 1971), cert. denied, 403 U.S. 939 (1971); United States ex rel. Hughes v. McMann, 405 F.2d 773 (2d Cir. 1968); United States v. Nash, 563 F.2d 1166 (5th Cir. 1977); Gilpin v. United States, 415 F.2d 638 (5th Cir. 1969); Holleman v. Duckworth, 700 F.2d 391 (7th Cir. 1983); Evans v. United States, 375 F.2d 355 (8th Cir. 1967), rev'd sub nom. Bruton v. United States, 391 U.S. 123 (1968), appeal after remand, 416 F.2d 310 (1969), cert. denied, 397 U.S. 1014 (1970); United States v. Robinson, 439 F.2d 553, 142 U.S. App. D.C. 43 (D.C. Cir. 1970).

It is then clear that Cagle, supra, and Swicegood v. State, 50 Ala. App. 105, 277 So.2d 380 (1973), have a solid foundation in constitutional law and are hereby affirmed. Indeed, to attempt to overrule these cases would be but an effort to overrule the United States Supreme Court, a power which does not reside with this Court.

The judgment of the Court of Criminal Appeals is reversed and the cause remanded with instructions to remand to the circuit court for a new trial.

REVERSED AND REMANDED.

Torbert, C. J., Maddox, Jones, Almon, Shores, Beatty and Adams, JJ., concur. Embry, J., dissents, Faulkner, J., joins dissenting.

Ex parte James Harvey Callahan 82-1172

EMBRY, JUSTICE (dissenting):

I will address the issue raised by the petitioner with respect to part eight of the opinion of the Court of Criminal Appeals. By way of letter brief, requested by this court following oral argument, the State aptly poses the issue here presented:

> "Petitioner urge[s] the Court to hold inadmissible his statement to law enforcement officials made February 24, 1982. The Petitioner's theory was that the statement was based upon an earlier statement made February 23, 1982, and that the State did not sufficiently prove that the specific warnings required by Miranda v. Arizona, 384 U.S. 436 (1966), were given to the Petitioner prior to the earlier statement; hence the allegedly inadmissible earlier statement tainted the later statement."

The State's brief continues:

> "The Petitioner base[s] his argument partially upon the doctrine of Swicegood v. State, 50 Ala. App. 105, 277 So.2d 380 (1973). In Swicegood a police

> officer's testimony that he read the defendant his rights, without elaboration of what those rights consisted of, was not sufficient to lay the Miranda predicate. The testimony here is somewhat similar. Although the Alabama Court of Criminal Appeals has applied Swicegood's holding several times; Robinson v. State, 399 So.2d 902 (Ala. Crim. App. 1978); Thomas v. State, 370 So. 2d 1066 (Ala. Crim. App. 1978), writ quashed, 370 So.2d 1070 (Ala. 1979); Kelly v. State, 366 So.2d 1145 (Ala. Crim. App. 1979), this Court has apparently never ruled upon this doctrine. Swicegood and its progeny should be overruled."

At the expense of repetition, this case presents a situation where the petitioner made two separate incriminating statements, the first on 23 February 1982, the latter on 24 February 1982. Concededly, the initial statement was not prefaced by appropriate Miranda formalities. Likewise, there is no question that the later statement was properly predicated pursuant to the guidelines of Miranda. Against this

backdrop, petitioner argues that the initial deficiency, enveloping his 23 February statement, taints, and thus renders inadmissible into evidence, any confession he may have made on 24 February. See Swicegood, supra; and Cagle v. State, 45 Ala. App. 3, 221 So.2d 119 (1969). I do not agree.

In effect, the State contends that, because the confession of 24 February (the one admitted into evidence) was predicated upon a valid Miranda warning, the burden shifted to the defendant to show the specifics of those Miranda rights not read or stated to him before the 23 February confession was given by him. To the extent Swicegood, Cagle, and subsequent cases hold otherwise, I would overrule those cases in that regard.

Faulkner, J., concurs.

APPENDIX C

APRIL 5, 1985

THE STATE OF ALABAMA - JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

OCTOBER TERM, 1984-85

82-1172 Ex parte: James Harvey Callahan

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF CRIMINAL APPEALS

(In re: James Harvey Callahan
v.
State of Alabama)

ON APPLICATION FOR REHEARING

PER CURIAM.

In its brief on application for rehearing, the State takes us to task for misconstruing its argument. It asserts that the first issue is whether the State sufficiently proved that the "first" confession on February 23 was preceded by adequate Miranda warnings. If not, says the State, there arises the second issue of whether the State met its burden of proving that the "second" confession of February

24, admitted into evidence, was sufficiently remote from the earlier confession so as to remove the taint of the improperly elicited confession. After the State filed its application for rehearing, the United States Supreme Court announced its decision in Oregon v. Elstad, ____ U.S. ____ (1985) [Ms. March 4, 1985]. That decision makes it relevant whether the initial question is "uncoercive."

The parties originally presented the issues in a narrow fashion which led this Court to take as fact the existence of only two confessions. In truth, there was not one "first" confession on the 23rd as to which there was some evidence of a prior Miranda warning; Callahan gave several statements during the course of persistent questioning on the 22nd and the 23rd. Even the district attorney admitted this during voir dire testimony concerning the

admissibility of any of the alleged statements:

> "Judge, I would like for the record to show that the State has not attempted to offer into evidence any of the four statements alluded to by [Callahan's attorney]. Any statements taken on Tuesday or any statements taken on Wednesday, the 22nd or the 23rd. A lot of the questioning has been in regard to those statements and for the purposes of the record, we would like it to be clearly indicated that the State has not offered any of those statements into evidence."

Reporter's Transcript, p. 265 (emphasis added). Furthermore, in complying with a discovery order, the State notified the court that it had given Callahan a copy of a written statement he had signed on the 22nd.

The State never did offer any of these prior statements nor seek to prove that Callahan was given any Miranda warnings on the 22nd. The only arresting officer who testified said unequivocally that Callahan

was not given any Miranda warnings when he was arrested. The only testimony regarding Miranda warnings given to Callahan on the 23rd prior to the statements made on that day was the following by an assistant district attorney:

> "Q. When did this questioning period begin, Mr. Hubbard?
>
> "A. On the 23rd, if I'm not mistaken, it was sometime in the mid afternoon or possibly early afternoon. I had seen Mr. Callahan that morning but we didn't go into any detail questioning, at that time.
>
> "Q. Was anyone else with you when you saw him that morning?
>
> "A. I know the same persons that I have already mentioned were present and I said there may be other persons that were present as well as --
>
> "Q. Were you asking him questions that morning?
>
> "A. I'm sure we asked him some questions; yes, sir.
>
> "Q. Okay, and how long were you questioning him that morning?
>
> "A. I don't remember the exact length of time. I know that I went down that morning probably around nine o'clock

or so and I don't think there was any formalized questioning of Mr. Callahan, though. We did go to the trailer where Mr. Callahan had formerly lived that morning.

"Q. There was no formal questioning of him?

"A. Yes, sir; I'm sure when we read him his rights and we probably asked him some questions. As far an any written statements being taken, down, I'm not aware of any.

"Q. You said you were sure you read him his rights; who was present when you read him his rights?

"A. The same people I just mentioned.

"Q. Did you make any record of that?

"A. I know that they had a waiver signed; yes, sir."

The only waiver which the State offered was signed at 12:07 p.m. on February 24.

The State argues that this Court should overrule Swicegood v. State, 50 Ala. App. 105, 277 So.2d 380 (1973), and a series of Court of Criminal Appeals cases following it, including Thomas v. State, 370 So.2d 1066 (Ala. Crim. App. 1981),

writ quashed, 370 So.2d 1070 (Ala. 1979). The Court of Criminal Appeals in Swicegood held that a generalized statement that "we read him his rights" is not a sufficient predicate for the introduction of a confession. The State now asks us to hold that such a showing is prima facie sufficient and shifts the burden to the defendant to show that the State did not give some of the specific warnings required for a voluntary, informed confession.

The State's argument begs the question. The State made no showing of any warnings given on the 22nd, and the series of questioning and statements is essentially continuous.

Callahan was arrested at 5:00 a.m. on February 22. He was questioned all that day and at least off and on during the 23rd. Callahan sought to introduce testimony that he had not slept and that

the deputies would not let him eat and otherwise coerced him into giving information on the 22nd and 23rd. Information which Callahan gave during this period was incorporated into a consent form which the D.A. prepared on the 24th and Callahan signed on that date. This consent form and the accompanying waiver of right to counsel led directly to the confession on the afternoon of the 24th which the trial court admitted into evidence.

On the afternoon of the 23rd, attorney Fred Ray Lybrand came to the jail at the request of Callahan's father. The deputies would not let Lybrand see Callahan until Lybrand got Judge Monk to come to the jail. Judge Monk went into the room where the deputies were questioning Callahan. Judge Monk stated for the record that he "basically advised [Callahan] of his Miranda rights and he [Callahan] stated

that he wished to speak with Mr. Lybrand." Callahan spoke with Lybrand and the deputies did not question him further that day.

On the morning of the 24th, Lybrand told the D.A. that he could not represent Callahan because of his connections with the victim's family. The deputies testified that, later that morning, Callahan sent word that he wanted to talk to them. At 12:07 p.m. he signed a waiver of counsel (Ex. 13), and a "consent" form (Ex. 12), agreeing "to accompany Deputy Sheriff M. L. Kirby and other law enforcement officers to the area or place I believe Becky Howell's boots, socks and other items of clothing may be located." The sheriff proceeded to take Callahan to the scene of the crime and other places to which Callahan directed him.

During this time on the afternoon of

the 24th, Callahan's present counsel, Wilford J. Lane, came to the sheriff's office and tried to inform the sheriff that he was representing Callahan. A deputy told Lane that the sheriff had taken Callahan away from the jail but would not say where. He apparently made a perfunctory attempt to call the sheriff on the radio and told Lane he was unable to reach the sheriff. The two occasions on which the deputies were reluctant to help Callahan's attorneys reach him, and the apparent failure to tell him that his initial counsel had withdrawn, raise questions not only of a coercive atmosphere of the questioning but also of a possible infringement of Callahan's 6th Amendment right to assistance of counsel. Escobedo v. Illinois, 378 U.S. 478 (1964).

During the questioning which occurred before Judge Monk advised him of his

Miranda rights on the 23rd, Callahan had told the deputies about throwing the victim's boots out of his truck. Thus the consent form shows on its face that it is tainted by the prior testimony. Callahan's attorney objected to the testimony about his leading the sheriff on the search pursuant to the consent form on the ground that it was tainted, but the court merely ruled that because Lybrand withdrew on the morning of the 24th, any statement taken after that was not in violation of Callahan's right to counsel.

After extensive continued voir dire, the court ruled that Callahan signed the waiver and consent forms voluntarily. The sheriff proceeded to testify how Callahan, shortly after signing the waiver and consent, took him to the scene of the kidnapping and led him through the various steps of the crime. Thus, there was

admitted over objection evidence which came about as a direct result of the waiver and consent as to which the State did not meet its burden of showing that it was not tainted by the prior illegally obtained confessions.

Oregon v. Elstad, supra, explicitly addresses only the situation where the initial confession occurs under uncoercive circumstances. In that case, the arresting officers went to Elstad's house with a warrant for his arrest. While one officer was talking to Elstad's mother in another room, another officer asked him three qurstions, to which he responded, admitting that he had participated in the burglary for which he was being arrested. Later, at the police station and after proper Miranda warnings, he waived his right to remain silent and candidly admitted his participation in the burglary. The United

States Supreme Court held that the Fifth Amendment of the United States Constitution did not require the exclusion of the subsequent confession from evidence, because both the first and second confessions were given voluntarily.

The situation here is quite different. The police questioned Callahan intensively for two days before he confessed on the third day. Apparently he initially denied knowledge of the crime, and even after confessing to being with the victim, he maintained that he had not killed her. The officers took a signed confession on the 22nd and 117 pages of stenographically-recorded confessions on the 23rd, but did not seek to introduce any of this material.

Over and above the inevitable coercive atmosphere of such questioning, Callahan testified on voir dire that his

interrogators threatened him with their guns and fists, although the officers denied this. He made a telephone call to his father, but the attorney whom his father sent only reached him with the help of the circuit judge. Notwithstanding any dispute in the testimony as to what actually took place during the questioning, the operative facts of this three-day questioning in the police station are sufficient to distinguish this case from Elstad. We certainly cannot say from this record that this questioning was uncoercive within the meaning of Elstad or that it did not impermissibly taint the later confession which the trial court admitted into evidence.

As the cases discussed in the original opinion establish, the burden is on the State to show the proper predicates for the admission of an extra-judicial confession:

lack of coercion, proper Miranda warnings, etc. The State also has the burden of showing that a subsequent, properly taken confession was not tainted by a prior, improperly taken confession. The record must affirmatively show that these burdens have been met. The record in this case does not come close to showing that the State has met its burden. Oregon v. Elstad lowers the State's burden, but it does not eliminate it.

OPINIONS EXTENDED; APPLICATION OVERRULED.

Torbert, C. J., Jones, Almon, Shores, Beatty and Adams, JJ., concur.

Maddox, J., dissents with opinion.

Faulkner and Embry, JJ., dissent.

MADDOX, JUSTICE (Dissenting):

On original deliverance I concurred in the majority opinion, but became convinced, on application for rehearing, even before the Supreme Court of the United States decided Oregon v. Elstad, ____ U.S. ____ (1985) [Ms. March 4, 1985], that the majority opinion was incorrect. I came to this conclusion based upon my further review of the record, which showed, in my judgment, that the confession which was admitted into evidence was not tainted in any way by any police conduct which preceded the defendant's making it. After studying Elstad, I am convinced more than ever that the State's application for rehearing should be granted.

Although I recognize the limited scope of Elstad, I nevertheless believe that the rule of law set forth in that opinion is applicable to the facts of this case. In

Elstad, the Court held:

> "When police ask questions of a suspect in custody without administering the required warning, Miranda dictates that the answers received be presumed compelled and that they be excluded from evidence at trial in the State's case in chief. The Court has carefully adhered to this principle, permitting a narrow exception only where pressing public safety concerns demanded. See New York v. Quarles, 467 U.S. at ____. The Court today in no way retreats from the bright line rule of Miranda. We do not imply that good faith excuses a failure to administer Miranda warnings; nor do we condone inherently coercive police tactics or methods offensive to due process that render the initial admission involuntary and undermine the suspect's will to invoke his rights once they are read to him. A handful of courts has, however, applied our precedents relating to confessions obtained under coercive circumstances to situations involving wholly voluntary admissions, requiring a passage of time or break in events before a second, fully warned statement can be deemed voluntary. Far from establishing a rigid rule, we direct courts to avoid one; there is no warrant for presuming coercive effect where the suspect's initial

> inculpatory statement, though technically in violation of Miranda, was voluntary.fn5 The relevant inquiry is whether, in fact, the second statement was also voluntarily made. As in any such inquiry, the finder of fact must examine the surrounding circumstances and the entire course of police conduct with respect to the suspect in evaluating the voluntariness of his statements. The fact that a suspect chooses to speak after being informed of his rights is, of course, highly probative."
>
> ---
>
> "5JUSTICE BRENNAN, with an apocalyptic tone, heralds this opinion as dealing 'a crippling blow to Miranda.' ... JUSTICE BRENNAN not only distorts the reasoning and holding of our decision, but, worse, invites trial courts and prosecutors to do the same." (Emphasis added.)

The majority discusses the effect of Elstad, and distinguishes it, as I understand the majority's opinion, on the ground that the facts of this case are substantially different from those in Elstad, and that here the State failed to meet its burden of showing that the prior

statements made by Callahan were free and voluntary. I cannot agree with this conclusion. As the majority admits, there was extensive voir dire, after which the court ruled that Callahan signed the waiver and consent forms voluntarily. (Emphasis added.) The actual finding by the court was as follows:

> "THE COURT: All right, I don't find any substantial credible evidence that the Defendant was in any way abused or threatened or denied access to a telephone -- denied communications to anyone that he wished to communicate with or that he was in any way forced to sign the two exhibits that are in issue; State's Exhibits Twelve and Thirteen. From what's been presented I find that he did so voluntarily and apparently in full understanding and knowledge of his rights.
>
> "All right, let's bring the jury down." (Emphasis added.)

Admittedly, there was testimony, if believed, which would have supported his theory that the statements which he made on

the 22nd and 23rd were not only inculpatory, but were also involuntary. On the other hand, there was testimony which showed, as the majority states in the extension of the original opinion, that Callahan "initially denied knowldege of the crime, and even after confessing to being with the victim, he maintained that he had not killed her." (Emphasis added.) Furthermore, the record shows, and the majority admits, that "[t]he deputies testified that, later that morning [the 24th], Callahan sent word that he wanted to talk to them." (Emphasis added.)

The relevant inquiry, as I view it, is: Was the confession made on the 24th voluntary, or was it tainted by the prior statements made by Callahan on the 22nd and 23rd: The rule of law in such circumstances is set out in Elstad.

In Elstad, a majority of the Supreme

Court held that "The relevant inquiry is whether, in fact, [a] second statement [the one admitted into evidence here] was... voluntarily made,' and that "[a]s in any such inquiry, the finder of fact must examine the surrounding circumstances and the entire course of police conduct with respect to the suspect in evaluating the voluntariness of his statement." In Elstad, the Court added that "[t]he fact that a suspect chooses to speak after being informed of his rights, is, of course, highly probative."

Here, the trial court did "examine the surrounding circumstances and the entire course of police conduct with respect to [Callahan] in evaluating the voluntariness of his statements," and concluded that they were voluntarily made. I would affirm his finding of fact. There is no question that the conduct and confession made by Callahan

on the 24th were voluntary, and the court could have found that Callahan initated the action which led to his signing of the consent form and the confession on the 24th. Furthermore, the trial court was authorized to find that Callahan chose to speak after being advised of his rights. This fact was "highly probative." Elstad.

The majority examines the surrounding circumstances and the entire course of police conduct with respect to Callahan and finds that it was coercive. Of course, I disagree with that finding, because I believe that the trial judge was authorized to find, as he did, that there was not "any substantial credible evidence that the defendant was in any way abused or threatened or denied access to a telephone --denied communications to anyone that he wished to communicate with or that he was in any way forced to sign the two exhibits

that are in issue ... ." (Emphasis added.)

Apparently, the majority feels that under the facts shown in the record, the police conduct here was "inherently coercive" and undermined Callahan's will to invoke his rights once they were read to him. I cannot say, as a matter of law, that is true. I think it was a factual question.

Consequently, I would grant the State's application for rehearing and affirm the judgment of the Court of Criminal Appeals; therefore, I respectfully dissent.